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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

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BY: \_\_\_\_\_

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. CR 2008-1339

Div. 6

**DEFENDANT'S REPLY IN  
SUPPORT OF MOTION FOR  
NEW FINDING OF PROBABLE  
CAUSE**

(Oral Argument Requested)

Defendant Steven C. DeMocker, by and through counsel, hereby replies to the State's Response to his Motion for New Finding of Probable Cause. Mr. DeMocker requests that this Court remand this matter to the grand jury pursuant to Rule 12.9 of the Arizona Rules of Criminal Procedure.

**ARGUMENT**

Despite being provided a clear and unambiguous set of instructions by this Court as to how to proceed, the State has once again denied Mr. DeMocker's his right to have clearly exculpatory evidence presented to the grand jury; to present the evidence to the

1 grand jury in a fair and impartial manner; and to require that an indictment be issued  
2 without the use of false, misleading, irrelevant and prejudicial testimony. While a grand  
3 jury makes only a probable cause determination and not a determination of guilt or  
4 innocence, its function is to provide a critical gate-keeping function between citizens  
5 and the power of the State. The grand jury “serves the invaluable function in our  
6 society of standing between the accuser and the accused . . . to determine whether a  
7 charge is founded upon reason or was dictated by intimidating power or by malice and  
8 personal ill will.” *Wood v. Georgia*, 370 U.S. 375, 390 (1962). Therefore, the law  
9 places limits on the how the State presents information to the grand jury, what  
10 information must be presented, and the State’s ability to place false, misleading and  
11 inaccurate testimony before the grand jury as has been done repeatedly in this case. To  
12 “do its job effectively, the grand jury must receive a fair and impartial presentation of  
13 the evidence.” *Maretick v. Jarrett*, 204 Ariz. 194, 197, 62 P.3d 120, 123 (2003)  
14 (defendant denied due process right to a fair and impartial grand jury proceeding). *See*  
15 *also Crimmins v. Super. Ct.*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983). Likewise, the  
16 State is obligated to present clearly exculpatory evidence to the grand jury. *Trebus v.*  
17 *Davis*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997). Clearly exculpatory evidence  
18 need only be “of such a weight that it *might* deter the grand jury from finding the  
19 existence of probable cause.” *Id.* (emphasis added). Lastly, the State must present the  
20 grand jury with the relevant, accurate and substantive facts. *See Herrell v. Sargeant*,  
21 189 Ariz. 627, 631, 944 P.2d 1241, 1245 (1997) (remand affirmed where County  
22 Attorney failed to present defendant’s version of the relevant, substantive facts).

23 The State’s latest comment that “[i]t is the totality of all the evidence” that forms  
24 the basis of a probable cause determination demonstrates precisely why these  
25 protections are so important. (Response at p. 8). As the State correctly notes, the grand  
26 jury shall issue an indictment “if from all the evidence taken together, it is convinced  
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1 that there is probable cause to believe the person under investigation is guilty of such  
2 public offense.” (Response at p. 8, citing A.R.S. §12-413) (emphasis added in State’s  
3 Response). The State controls what evidence is presented to the grand jury. If it  
4 exercises that control to give the jury false, incomplete and misleading evidence and  
5 excludes exculpatory evidence, as in this case, the grand jury is prevented from doing its  
6 job and substantive due process is denied.

7 The State’s presentation in this case resulted in a denial of Mr. DeMocker’s  
8 rights and this Court should therefore remand the case for a new determination of  
9 probable cause.

10  
11 **I. THE STATE’S FAILURE TO PRESENT CLEARLY EXCULPATORY**  
12 **EVIDENCE REQUIRES REMAND FOR A NEW FINDING OF**  
13 **PROBABLE CAUSE.**

14 The State’s most recent contention that Mr. DeMocker seeks to remand the case  
15 for a new determination of probable cause “based on one or two pieces of evidence” is  
16 simply not true. The State repeatedly ignored its obligation to provide the grand jury  
17 with clearly exculpatory evidence. The Arizona Supreme Court has noted that because  
18 the State’s interest must not be only in getting an indictment, but also in serving the  
19 interests of justice, “[w]e therefore see nothing odd in requiring the prosecutor to tell the  
20 grand jury about possible exculpatory evidence.” *Trebus*, 189 Ariz. at 624, 944 P.2d at  
21 1238. The State concedes, as it must, that it is required to present clearly exculpatory  
22 evidence and also acknowledges that it failed to present some of it to the grand jury.  
23 (Response at pp. 5-6). However, the State argues instead that it is “not obligated to  
24 present all arguably exculpatory evidence” and quarrels with the designation of some of  
25 the evidence as exculpatory. Unfortunately, in doing so it relies on cases not relating to  
26 the exclusion of exculpatory evidence. *State v. Coconino County Super. Ct.*, 139 Ariz.  
27 422, 426, 678 P.2d 1386, 1390 (1984) (overturning remand motion made because of  
28

1 failure to present evidence of mental health); *O'Meara v. Gottsfield*, 174 Ariz. 576, 578-  
2 79, 851 P.2d 1375, 1377-78 (1993) (affirming denial of remand motion where state did  
3 not redefine previously defined term for grand jury). The other case cited by the State  
4 on this point held that, absent a showing of prejudice on appeal, the trial judge had not  
5 committed reversible error by only remanding part of the indictment. *State v. Baumann*,  
6 125 Ariz. 404, 409, 610 P.2d 38, 43 (1980).

7 The State is clearly wrong in thinking that it is not required to present all clearly  
8 exculpatory evidence (*see Trebus*) and the evidence omitted in this second presentation  
9 by the State was clearly exculpatory. In fact, this Court previously held as much in its  
10 prior Remand Order.

11  
12 **1. The State's Misleading Testimony Regarding "Inconclusive Results"**  
13 **and Unknown Male DNA on the Cordless Phone, Laundry Room**  
14 **Light Bulbs, and Door Handle Requires Remand.**

15 The State defends its confusing and contradictory testimony on the DNA  
16 evidence by claiming to simply be following the Court's suggestion to use the same  
17 language as prospective expert witnesses when describing results. (Response at p. 3).  
18 This position is disingenuous at best. This Court's Remand Order expressly found that  
19 the presence of unknown male DNA on the cordless phone, the presence of unknown  
20 male DNA on the light bulbs from the laundry room, and the presence of unknown male  
21 DNA on the door handle were each clearly exculpatory. (Remand Order, at p. 3).  
22 Instead of providing the grand jury with this evidence in a fair and impartial manner, the  
23 State chose to have its witness recite the contradictory, confusing and highly technical  
24 language of virtually every lab report. This even included testimony about lab reports  
25 that the State knew were later superseded. For example, the State told the grand jury  
26 this time that male DNA **was** and **was not** found on the cordless phone. Detective  
27 Brown testified about *nine* different reports on the cordless phone and referred to it  
28 variously as a "cordless handset" (GJ55:13), "phone item" (GJ55:18), "No. 507A"

1 (GJ55:21), "item No 7" (GJ57:14), and "No. 507" (GJ57:18), and concluded by telling  
2 the grand jurors "so each test has to be looked at different ways because they're testing  
3 a certain portion, and one can't be used to check against the other I guess is the best way  
4 to do it. They do the best with what they have at that time." (GJ58:9-13). The State  
5 also presented testimony that cellular material **was** and **was not** found on the same light  
6 bulbs and told the grand jury that the male DNA on the light bulbs may in fact be Mr.  
7 DeMocker's because results were "inconclusive". Detective Brown testified about at  
8 least four DNA reports on the light bulbs and two fingerprint reports. (GJ60-62). The  
9 State also did not tell the grand jury that unknown male DNA was on the door handle.  
10 In fact, the State acknowledges that the sum of its testimony was that the results were  
11 **inconclusive** on each of these items of evidence. (Response at p. 3). This was directly  
12 contrary to this Court's prior Remand Order, which held that telling the grand jury that  
13 the evidence on the light bulbs was inconclusive was insufficient and that not telling the  
14 grand jury that unknown male DNA was found on the door handle was incomplete.  
15 (Remand Order at p. 3).

16 The State also claims that the grand jury was not confused and "had no problems  
17 following the testimony." (Response at 4). This is belied by a grand juror's question  
18 expressing confusion "[y]ou talked about sending all the blood sample, DNA to three –  
19 two or three separate labs." He then asked about preservation and said, "I don't  
20 understand that." The response from Detective Brown concluded with "I don't know  
21 exactly how the labs do what they do. We just get the things, and because we're  
22 requesting it, we have to send it to them. We would get stuff sent back, and get stuff  
23 sent out." (GJ78:16-19). This testimony evidences confusion by both the grand jury  
24 and the witness charged with explaining the forensic testimony.<sup>1</sup>

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27 <sup>1</sup> The grand jury was also confused about the dead bolt evidence asking about fingerprint evidence on the dead bolt  
when the testimony about the dead bolt was related to DNA evidence. (GJ75:25-76:2).

1 Furthermore, the State's argument that it was merely using "the exact language used in  
2 the reports" is not true. (Response at p. 4). The grand jury was left with the mistaken  
3 belief that the results were inconclusive in excluding Mr. DeMocker, not that they were  
4 inconclusive because the samples were insufficient. In fact, Detective McDermott told  
5 the grand jury that DNA was collected and tested for "anybody that had been to the  
6 house, and we had that DNA subsequently tested. *At this point, the only viable suspect*  
7 *is Mr. DeMocker.*" (GJ89:12-15). This was not "exact language used in the reports"  
8 and is, in fact, an unsupported and highly prejudicial conclusion contrary to all of the  
9 forensic evidence. Furthermore, Detective Brown actually suggested to the grand jury  
10 that Mr. DeMocker's DNA and fingerprints were found at the scene. When asked if it  
11 was true that Mr. DeMocker's fingerprints and DNA were not found at the scene, he  
12 responded "I can't say that for sure *because of inconclusive results.*" (GJ62:19-22).  
13 That is precisely the same answer given by Detective Brown in the *Simpson* hearing,  
14 and it was no more true at the time of this second grand jury presentation than it was  
15 when made to this Court. Put simply, the **only** truthful answer Detective Brown could  
16 have given to that question was that there was no forensic evidence that Mr.  
17 DeMocker's blood, DNA, or fingerprints were found at the scene.

18 This testimony was particularly prejudicial given that the State ignored Mr.  
19 DeMocker's request to present evidence to the grand jury that over fifty items of  
20 evidence were seized and tested without finding any connection between Mr. DeMocker  
21 and the victim. Instead, the State told the grand jury that it seized Mr. DeMocker's  
22 shoes, bike and "swabbings" but did not tell the grand jury that the results of all of that  
23 testing were negative. The State does not deny that this is clearly exculpatory and it  
24 would be nonsensical to do so – clearly this evidence is "of such a weight that it *might*  
25 deter the grand jury from finding the existence of probable cause." *Trebus*, 189 Ariz. at  
26 625, 944 P.2d at 1239 (emphasis added).

1           The State's failure to present the exculpatory DNA evidence and its refusal to  
2 present the other exculpatory evidence requested by defense counsel resulted in a denial  
3 of Mr. DeMocker's rights and; therefore, the grand jury was blocked, by the State's  
4 conduct, from considering "**all the evidence taken together.**" The State's DNA  
5 testimony was not an attempt to follow the Court's reasonable direction, but rather an  
6 attempt (once again) to skew the evidence unfavorable to the State and mislead the  
7 grand jury. Remand is therefore required. *See id.*, 189 Ariz. at 624, 944 P.2d at 1238  
8 and *Herrell*, 189 Ariz. at 631, 944 P.2d at 1245. *See also Maretick*, 204 Ariz. at 197, 62  
9 P.3d at 123.

10  
11           **2.       The State's Failure to Present Evidence of an Unidentified**  
12           **Fingerprint and Exculpatory Shoe Prints Requires Remand.**

13           The State's failure to present exculpatory evidence of an unidentified fingerprint  
14 and shoe print evidence also requires remand. The State's response does not dispute  
15 that it failed to tell the grand jury of an unknown person's fingerprint on a stack of  
16 papers found at the scene. (Evidence Item 852, Bates Nos. 3044 and 3047). Instead,  
17 the State now argues that the fingerprint alone is not exculpatory. (Response at p. 6).  
18 This again misrepresents the true nature of the evidence. This fingerprint evidence is  
19 clearly exculpatory when considered in combination with the other available DNA and  
20 fingerprint evidence suggesting the presence of some other unknown suspect or  
21 suspects. Mr. DeMocker has been excluded from the fingerprint, it was found at the  
22 victim's home, and it was found on papers containing the victim's handwriting. While  
23 it may be correct that considering this fingerprint evidence in a vacuum is not clearly  
24 exculpatory, when viewed in light of "**all the evidence taken together,**" it obviously is.  
25 A.R.S. §12-413 (emphasis added).

26           The State's response also does not address its failure to tell the grand jury that  
27 none of the shoes it seized from Mr. DeMocker matched the shoe prints it found behind  
28

1 the victim's house. Although the State elicited testimony that Mr. DeMocker's shoes  
2 were seized for comparison, and that there were shoe tracks in a pattern behind the  
3 victim's home, it did not tell the grand jury that Mr. DeMocker's shoes did not match  
4 the tracks found. This is important because the State suggested to the grand jury that  
5 Mr. DeMocker had ridden his bike to a location behind the victim's house around the  
6 time she abruptly ended a phone call with her mother. Evidence that the shoe prints at  
7 the scene did not match those of Mr. DeMocker is "of such a weight that it *might* [have]  
8 deter[ed] the grand jury from finding the existence of probable cause." *Trebus*, 189  
9 Ariz. at 625, 944 P.2d at 1239 (emphasis added). Remand is therefore required. See  
10 *Id.*, 189 Ariz. at 624, 944 P.2d at 1238 and *Herrell*, 189 Ariz. at 631, 944 P.2d at 1245.  
11 See also *Maretick*, 204 Ariz. at 197, 62 P.3d at 123.

12  
13 **3. Remand is Required Because the State Failed to Introduce Other**  
14 **Clearly Exculpatory Evidence.**

15 The State failed to advise the grand jury of other clearly exculpatory evidence as  
16 well. For example, the State failed to tell the grand jury, as requested, that there are no  
17 prior reports of domestic violence between the victim and Mr. DeMocker. The State  
18 does not deny that this is clearly exculpatory. The State also failed to give the grand  
19 jury accurate information about the rainfall in the area. Furthermore, the State refused  
20 to tell the grand jury that although the sun may have set at 7:46 p.m. it did not get dark  
21 on July 2 until 9:00 p.m. Instead, the State presented false and irrelevant testimony  
22 about where and how long Mr. DeMocker's bike ride was to suggest to the grand jury  
23 that Mr. DeMocker was riding his bike well after dark. (*See infra*). The State's  
24 suggestion that it would have been "misleading" to tell the grand jury that it did not get  
25 dark until 9:00, when the sun set at 7:46 is baseless. Also, the State provided  
26 misleading and incomplete information to the grand jury about Mr. DeMocker's bike  
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1 ride in relation to the victim's home. Although the State told the grand jury that the trail  
2 was between one and half miles from the victim's home (GJ38:19-20), it also told them  
3 "[t]he place where he parked is right across. You would hang a left and drive up a little  
4 ways." (GJ 38:21-25, 39:1). Finally, even though Mr. DeMocker requested that the  
5 grand jury be told in discussing the replacement of his passport that Mr. DeMocker was  
6 not under arrest, nor told to restrict his travel. When specifically asked by grand jurors  
7 if Mr. DeMocker was told not to travel, or not to replace his passport, Detective  
8 McDormett responded only "I don't believe so." This testimony left the grand jury to  
9 speculate on the possibility that he may have been so restricted, when he knew without  
10 question that was not true. (GJ111:5-112:1). Even if the witness did not know this  
11 information, Mr. Ainley surely did, and had a duty to correct it.  
12

13 **II. THE STATE'S SOLICITATION OF FALSE AND MISLEADING**  
14 **TESTIMONY REQUIRES REMAND FOR A NEW FINDING OF**  
15 **PROBABLE CAUSE.**

16 The State repeatedly ignored its duty to provide a fair and impartial presentation  
17 of the evidence, instead relying on false, misleading and prejudicial testimony. A  
18 prosecutor's failure to correct false testimony or a witness providing misleading  
19 testimony necessarily results in a denial of substantial due process and requires a  
20 remand for a new determination of probable cause. *Nelson v. Royston*, 137 Ariz. 272,  
21 277, 669 P.2d 1349, 1354 (Ct. App. 1983). The obligation to correct false or misleading  
22 testimony exists even where the State has not solicited such testimony. *See Napue v.*  
23 *Illinois*, 360 U.S. 264, 269 (1959). The State's response ignores several instances of its  
24 own failure to present the evidence in a fair and impartial manner, including the  
25 following crucial pieces of the State's case: evidence allegedly placing Mr. DeMocker  
26 near the scene; the only evidence allegedly connecting Mr. DeMocker to the purported  
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1 murder weapon; and the only evidence regarding his alleged motive. The false,  
2 misleading and prejudicial testimony on these critical issues requires remand.

3  
4 **1. Misleading and Incomplete Testimony Regarding Bicycle Tire Track**  
5 **Comparison Requires Remand.**

6 The State's response does not address its misleading and incomplete bicycle tire  
7 track testimony given to the grand jury. The State placed greater emphasis on the lay  
8 opinion of Sergeant Daniel Winslow, who found that the Mr. DeMocker's bike tires  
9 "appeared identical" (GJ45:5-19) to tracks at the scene, than to the expert report of DPS,  
10 which found only that there were "similar" tire tread patterns and nothing further could  
11 be determined. (Bates No. 26). Also, Detective Brown did not tell the grand jury that  
12 DPS could not verify if the rear tire tracks at the scene were made by a deflated tire. A  
13 grand juror specifically asked about whether the back tire was flat when tested.  
14 (GJ75:2-15). This misleading and incomplete testimony was critical because the State  
15 used it to attempt to place Mr. DeMocker near the scene. The State ignored the expert  
16 opinion of DPS on the tire tracks and used instead lay opinions that were more  
17 favorable to the State. This Court previously found that it would not speculate  
18 "[w]hether it was the intention of the witness to make the case appear better by using  
19 other language and omitting the qualifying language." (Remand Order at p. 4). Having  
20 repeated this practice with the second grand jury on a critical piece of evidence, Mr.  
21 DeMocker has no choice but to conclude that the State was again manipulating and  
22 omitting evidence to make its case appear better. As to this evidence, the State was  
23 clearly ignoring this Court's suggestion to use the language of the prospective expert  
24 when discussing reports. Again, the State's failure to provide a fair, impartial and  
25 complete presentation of this evidence to the grand jury necessarily meant that the grand  
26 jury could not perform its function of reviewing "**all the evidence taken together.**"  
27 A.R.S. §12-413 (emphasis added). The State's conduct violated the "duty of good faith  
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1 on the part of the prosecutor with respect to the court, the grand jury, and the  
2 defendant.” *Nelson*, 137 Ariz. at 276, 660 P.2d at 1353.

3  
4 **2. Misleading Evidence Regarding the Cause of Victim’s Injuries and**  
5 **Irrelevant Evidence Regarding a Golf Club Head Cover Requires**  
6 **Remand.**

7 The State’s response does not address the misleading evidence it presented  
8 regarding the cause of the victim’s injuries or the irrelevant evidence it presented  
9 regarding the golf club head cover. Again, the State was not concerned about following  
10 the Court’s suggestion to use the language of the prospective expert with this testimony.  
11 Detective McDormett did not tell the grand jury that Dr. Laura Fulginiti’s written report  
12 concluded only that the golf club “cannot be ruled out as the cause of the defects.”  
13 (Bates No. 000549). Instead, he told the grand jury that Dr. Fulginiti said that “...a golf  
14 club would be consistent.” (GJ102:7-13). Detective McDormett also failed to tell the  
15 grand jury that Dr. Fulginiti said that in determining if the particular golf club was the  
16 weapon, other golf clubs and objects should be tested to show the differences in impact  
17 damage. (Bates No. 001939). This testimony was misleading and highly prejudicial  
18 because the State has argued that a golf club was the weapon and even went so far as to  
19 put a posed photograph of the deceased victim next to a golf club in front of the grand  
20 jury.

21 Detective Brown also falsely told the grand jury that Detectives prepared a  
22 second search warrant for the missing golf club head cover. (GJ68:18-22). Detective  
23 Brown and Mr. Ainley both knew that this search warrant sought only shoes, golf clubs  
24 and items resembling a golf club. (Bates Nos. 1656-1657). This testimony was false  
25 and misleading and the State failed to correct it. The State’s weaving of the discussion  
26 of the victim’s injuries with the discussion of the golf club head cover is a further  
27 example of the presentation of false, misleading and irrelevant testimony on this  
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1 evidence. Mr. DeMocker was denied his right to have the State present this evidence to  
2 the grand jury in a fair and impartial manner. Substantive due process in grand jury  
3 proceedings “requires the use of an unbiased grand jury and a fair and impartial  
4 presentation of the evidence.” *See Crimmins*, 137 Ariz. at 41, 668 P.2d at 884.

5  
6 **3. The State’s Misleading, Speculative Information About Mr.  
DeMocker’s Alleged Financial Fraud Requires Remand.**

7 The State’s response also fails to address the misleading and speculative  
8 testimony it presented to the grand jury regarding Mr. DeMocker’s alleged financial  
9 fraud. The State’s testimony on these issues was directly contrary to this Court’s  
10 findings in both the *Simpson* and Remand Order. (Simpson Order at pp. 2-3, Remand  
11 Order at p. 4). Rather than conceding that no actual evidence of any fraud on the part of  
12 Mr. DeMocker exists, the State chose to elicit testimony that Mr. DeMocker was  
13 engaged in financial fraud throughout his divorce with the victim - even though this  
14 Court specifically found expressly to the contrary in its prior rulings. The grand jury  
15 also heard false and misleading testimony that the victim communicated to Mr.  
16 DeMocker that she was going to report him to the IRS. This too was directly contrary  
17 to the evidence and to this Court’s prior findings on the evidence. *Id.* Mr. Ainley also  
18 elicited rank speculation about the consequences to Mr. DeMocker if the IRS  
19 discovered his alleged financial fraud. Again, this testimony was not based in fact and  
20 was grossly prejudicial. There are multiple items of exculpatory evidence listed in Mr.  
21 DeMocker’s *Trebus* letter and Second Remand Motion that the State ignored regarding  
22 Mr. DeMocker’s alleged financial motive. The State’s response does not deny that this  
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1 evidence is clearly exculpatory, nor does it explain why it presented false and  
2 misleading testimony but failed to present the clearly exculpatory evidence on this issue  
3 as required by *Trebus*. Misleading, incomplete and inaccurate information about Mr.  
4 DeMocker's non-existent financial fraud fabricated a motive for Mr. DeMocker and  
5 violated Mr. DeMocker's substantial due process rights – as did the State's failure to  
6 provide the grand jury with relevant exculpatory information. In short, the presentation  
7 on this topic added nothing to the incomplete, false and misleading presentation to the  
8 first grand jury other than the "cheerleading" of Mr. Echols with no new factual  
9 evidence this time around. A remand for a new determination of probable cause is  
10 therefore required. *Maretick*, 204 Ariz. at 198, 62 P.3d at 124.

13  
14 4. **False Testimony Regarding Mr. DeMocker's Bike Ride and Jana**  
15 **Johnson Requires Remand.**

16 The State's presentation of false and misleading testimony about Mr.  
17 DeMocker's bike ride, and Jana Johnson's interview requires remand. The testimony  
18 was false, the State knew it was false, and the State failed to correct it. The State  
19 presented false and misleading testimony that Mr. DeMocker said his bike ride was four  
20 and half hours when it only took Detective Brown an hour and 26 minutes to walk the  
21 route. This evidence was critical because it was used to challenge Mr. DeMocker's alibi  
22 and his truthfulness. The State also presented admittedly irrelevant testimony about the  
23 absence of tracks on a trail where Mr. DeMocker was not riding his bike. In addition,  
24 the State failed to tell the grand jury that it took detectives three days to return to look  
25 for the trail Mr. DeMocker was riding on and ten days to seriously attempt to locate it.

26 The same is true with respect to the testimony provided to the grand jury about  
27 Jana Johnson's interview. The State gave the grand jury inaccurate and misleading

1 information about Ms. Johnson's description of the person riding the bike, what the bike  
2 looked like, what time she saw the bike, what the person on the bike was wearing, and  
3 what kind of bike she said it was. This testimony was used by the State to suggest to the  
4 grand jury that Mr. DeMocker was near the scene near the time of the crime. This false  
5 and misleading testimony, and the State's failure to correct it, necessarily resulted in a  
6 denial of substantial due process and require a remand for a new determination of  
7 probable cause. *Nelson*, 137 Ariz. at 277, 660 P.2d at 1354; *see also Maretick*, 204  
8 Ariz. at 198, 62 P.3d at 124.

9  
10 **5. Remand is Required Because Unsupported Theories Were Presented**  
11 **to the Grand Jury as Fact.**

12 As with the first grand jury presentation, the State continued to present opinion  
13 and unfounded speculation as fact in a highly prejudicial way with the second grand  
14 jury. The State engaged in the following when presenting unsupported theories as fact:  
15 putting a golf club next to the deceased victim and asking a lay person if the injuries on  
16 the victim matched the golf club, (GJ68:12-15); eliciting speculation about the IRS  
17 responding to Mr. DeMocker's alleged financial fraud, (GJ146:21-25); eliciting further  
18 speculation that Mr. DeMocker "would be in serious trouble" and "lose everything" if  
19 there was "hanky-panky with his finances," (GJ147:4-148:2); eliciting blood spatter  
20 speculation by a lay witness about scene staging, (GJ25:7-16); and eliciting speculation  
21 about what other witnesses knew or didn't know based on voice mail messages.  
(GJ77:1-9). The only possible purpose of this evidence was to prejudice the grand jury.

22 The State's repeated violation of its duty to present fair and unbiased evidence  
23 requires remand. Substantive due process in grand jury proceedings "requires the use of  
24 an unbiased grand jury and a fair and impartial presentation of the evidence." *See*  
25 *Crimmins*, 137 Ariz. at 41, 668 P.2d at 884.

26 **CONCLUSION**

1 This is the second time the State has failed to provide the grand jury with the  
2 evidence in a fair and impartial manner and has instead presented the grand jury with  
3 false, misleading, incomplete and prejudicial evidence. This violated Mr. DeMocker's  
4 rights and interfered with the grand jury's ability to stand between a citizen and the  
5 power of the State to ensure that a charge is not "dictated by intimidating power or by  
6 malice and personal ill will." *Wood*, 370 U.S. at 390. The State has once again  
7 prevented the grand jury from fulfilling this important function and has violated Mr.  
8 DeMocker's rights in the process.

9 For these reasons Mr. DeMocker respectfully requests that the Court remand this  
10 matter to the grand jury for a new determination of probable cause.

11 DATED this 24th day of April, 2009.

12  
13 By: 

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22 Attorneys for Defendant

23 ORIGINAL of the foregoing filed  
24 this 24<sup>th</sup> day of April, 2009, with:

25 Jeanne Hicks,  
26 Clerk of the Court  
27 Yavapai County Superior Court  
28 120 S. Cortez  
Prescott, AZ 86303

COPIES of the foregoing hand delivered  
this 24<sup>th</sup> day of April, 2009, to:

The Hon. Thomas B. Lindberg

1 Judge of the Superior Court  
2 Division Six  
3 120 S. Cortez  
4 Prescott, AZ 86303

5 Mark K. Ainley, Esq.  
6 Office of the Yavapai County Attorney  
7 255 E. Gurley  
8 Prescott, AZ 86301-3868

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